Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BRIAN SHEPPARD,
Petitioner,

v.

LEON BEERMAN,
as an individual and in his official capacity as Justice of the Supreme Court of the State of New York,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In ruling that law clerks as a class do not have a reasonable expectation of privacy in their private offices and their desks and file cabinets therein, did the Second Circuit properly apply the case-by-case approach espoused by a plurality of this Court in *O'Connor v. Ortega*, 480 U.S. 709 (1987)?

2. Is the seizure of a government employee's private belongings upon his or her retaliatory discharge reasonable if the purpose of the seizure is to suppress evidence of the employer's misconduct that led to the discharge and if the seizure continues over a period of days?

3. If a law clerk is discharged for objecting to the misconduct of the judge for whom he or she works, does the Fourth Amendment impose any restrictions on the judge's examination of the clerk's private papers found during a search of the clerk's workplace after the discharge?

4. Is a court employee seized within the meaning of the Fourth Amendment when he or she is forcibly removed from the courthouse and prevented from reentering it?

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II. The decision below both presents this Court with an issue expressly left open in *Ortega*--the appropriate standard for determining the propriety under the Fourth Amendment of a seizure of personal belongings in the workplace--and directly conflicts with the holding in *Ortega* that a workplace search or seizure violates that Amendment if it is effected for an illegitimate purpose. 26

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IN THE

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BRIAN SHEPPARD,

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LEON BEERMAN,
as an individual and in his official capacity as Justice of the Supreme Court of the State of New York,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Brian Sheppard respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on March 3, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 18 F.3d 147, and is reproduced in

the Appendix hereto. (1a.)[1]

The memorandum decision of the United States District Court for the Eastern District of New York (Glasser, D.J.) is reported at 822 F. Supp. 931, and is reproduced in the Appendix. (23a.)

JURISDICTION

The judgment of the Court of Appeals was entered on March 3, 1994. No petition for rehearing was sought. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched,

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[1]All of the appendix material for this Petition appears in one separately bound volume. Pagination in the Appendix includes the suffix "a."

and the persons or things to be seized.

STATEMENT OF THE CASE

A. *Procedural History*

Petitioner, a 1979 graduate of Stanford Law School, embarked on a career in the New York State judicial trial system after having spent seven years as an appellate practitioner. In 1986, Respondent, a justice of the New York State Supreme Court, sitting in Queens County in New York City, hired Petitioner as his law clerk.[2] However, in 1990, when Petitioner objected in chambers to Respondent's pattern of judicial misconduct, Respondent fired him; ejected him from the courthouse; searched and seized his belongings; and took the public position that he was

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[2]Justices of that court are elected to sit as trial judges for one or more 14-year terms. Each justice is entitled to select one law clerk and one secretary. Both often work for the justice for much or all of the justice's tenure. The law clerks frequently ascend to the judiciary themselves before that tenure expires.

discharged for cursing and losing control of himself.

In 1991, Petitioner instituted this action for damages and declaratory and injunctive relief pursuant to 42 U.S.C. § 1983.[3] The Complaint, which is reproduced in the Appendix (67a), alleged, inter alia, that Respondent's conduct deprived him of his Fourth Amendment right to be free from unreasonable searches and seizures and his First Amendment right to freedom of speech.

Respondent filed a timely Answer, and his motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) (hereinafter 12(c))--claiming that the Complaint failed to state a cause of action--was deemed submitted in April of 1992. The District Court granted the motion in its entirety in May of 1993. In

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[3]Jurisdiction in the District Court was also predicated on 28 U.S.C. §§ 1331 (federal question), 1343 (equitable relief), 1367 (supplemental or pendent), and 2201-2202 (declaratory relief).

March of 1994, the Court of Appeals vacated the portion of the judgment which dismissed Petitioner's free speech claim, and affirmed the remainder of the judgment.

B. *The Searches and Seizures of Petitioner's Workplace, Property, and Body*

On December 7, 1990, the parties engaged in a heated dispute in chambers concerning Respondent's intermittent, but nevertheless egregious, official misconduct, such as engaging in improper ex parte communications with prosecutors; ordering Petitioner to draft decisions on motions in the prosecution's favor--regardless of their merits; and arranging to have a case assigned to Respondent so that he could exact personal revenge against the accused. Respondent denied having acted improperly until Petitioner indicated that he had taken notes of the activities in question.

Before Petitioner's next day at work

on December 11, Respondent fruitlessly searched Petitioner's private office in chambers in the hope of finding the notes. After Petitioner had been working in chambers for two hours on the 11th, court officers entered chambers, advised him that Respondent had just discharged him, and forced him to accompany them out of the courthouse, without being given an opportunity to gather his belongings. His reentry into the courthouse was forcibly barred for an indefinite period.

After the ejection, Respondent conducted another search of Petitioner's office, including the desk, file cabinets, and personal effects therein. A box of Petitioner's personal file cards was seized, removed into Respondent's private office, and examined. When Petitioner was permitted to gather his belongings in the company of court officers two days after his termination, he managed to obtain the

box of cards only after discovering and protesting its removal. However, he was prevented at that time from taking with him personal files from the file cabinet in his office, and was permitted to take those files several days later only after Respondent had an opportunity to inspect them.

Respondent took the public position that Petitioner was discharged for cursing and losing control of himself. As a result of the discharge, Respondent's public stance about it, and Petitioner's public ejection from the courthouse, Petitioner was unemployed for the first eighteen months after his termination, and, after an additional two years, has still be unable to obtain employment as a law clerk or a practicing attorney.[4]

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[4]Petitioner repeatedly advised the District Court of his dire economic circumstances since his discharge by Petitioner. Nevertheless, contrary to official guidelines, *see* 28 U.S.C. § 476, 481;

C. *Decisions Below*

1. *Free speech claim*

Despite Petitioner's position on the 12(c) motion that the court had to accept the allegations in the Complaint (67a-68a, ¶ 1; 73a-75a, ¶¶ 18, 20, 22) that he was discharged because of his speech, the District Court held that the Complaint failed to state a free speech claim because he was discharged for insubordination, and because the speech in question did not relate to a matter of public concern. (29a-45a.) In reaching its conclusion, the court emphasized the "intensely personal and confidential" nature of the judge/clerk relationship. (32a.)

E.D.N.Y. Civ. Just. Expense & Delay Reduction Plan § I.F.2, and to the District Court's own track record in other cases, *see* Pet. Mandamus at 32-34, *In re Sheppard*, No. 93-3030 (2d Cir. Apr. 27, 1993) (order denying mandamus relief), that court did not decide Respondent's 12(c) Motion for 13 months, and ultimately did decide it only after Petitioner obtained an order from the Court of Appeals denying a mandamus application "without prejudice to renewal in 30 days," *In re Sheppard*.

The Court of Appeals vacated this portion of the District Court's judgment, agreeing with Petitioner's argument that the court had made "improper factual findings" that he was "actually discharged for insubordination and not for his speech," since the motive behind the termination "is clearly a question of fact." (3a, 10a, 12a.) In this Petition, Petitioner does not challenge this favorable ruling of the Court of Appeals.[5]

2. *The Searches of Petitioner's Workplace*

Petitioner argued to both courts below that under the case-by-case approach endorsed by the plurality opinion in

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[5]Nor is the propriety of the unfavorable First Amendment rulings of the courts below--regarding the rights to obtain access to criminal proceedings and to petition the government for redress of grievances--raised in this Petition, except to the extent that those rulings relate to the Fourth Amendment issues raised in the Petition. *See infra* part IV., pp. 41-42 note 26; *see also* Robert Stern, Eugene Gressman & Steven Shapiro, *Supreme Court Practice* § 6.25, at 360-61 (6th ed. 1986).

O'Connor v. Ortega, 480 U.S. 709, 718-19 (1987), the Complaint (77a-78a, ¶ 29) clearly set forth a reasonable expectation of privacy on Petitioner's part on the basis of the custom and policy of Respondent and other New York judges. In putatively engaging in the case-by-case approach endorsed in that opinion, those courts made no mention of the allegations in the Complaint about the circumstances of Petitioner's expectation of privacy.

Instead, the District Court, harkening back to its ruling on the free speech claim, *see supra* part C.1., p. 8, held that the judge/law clerk relationship is "sui generis," and thus that law clerks who work for judges in "large metropolitan areas," where the chambers are "virtually inundated" with documents, have "no reasonable expectation of privacy in chambers' appurtenances, embracing desks, file cabinets or other work areas." (49a-

52a.) The Court of Appeals, without limiting its analysis to law clerks in large metropolitan areas, endorsed the position taken by that court:

> The working relationship between a judge and her law clerk, as noted by the district court, is unique. Unlike a typical employment relationship where an employer may limit the information she wants to share with her employees, in order for a judicial chambers to function efficiently, an absolute free flow of information between the clerk and the judge is usually necessary. Accordingly, the clerk has access to all the documents pertaining to a case. More importantly, clerks regularly have access to the judge's confidential thoughts on a case. The judge may discuss her feelings with her clerk, or may allow the clerk access to her personal notes. In turn, the judge necessarily has access to the files and papers kept by the clerk, which will often include the clerk's notes from discussions with the judge. Because of this distinctive open access to documents characteristic of judicial chambers, we agree with the district court's determination that Sheppard had "no reasonable expectation of privacy in chambers' appurtenances, embracing desks, file cabinets or other work areas."

(16a-17a.)

3. *The Seizure of Petitioner's Property*

Petitioner argued to both courts below that in ruling on Respondent's 12(c) motion, those courts had to accept the allegations in the Complaint (73a-74a, ¶¶ 18-19; 76a-77a, ¶¶ 24-27) that Respondent seized Petitioner's property upon and after ejecting him from the courthouse, not for any legitimate work-related reason, but to locate and suppress notes Petitioner had taken about Respondent's misconduct. However, both courts held that the seizure and retention of the property over the course of days was reasonable in purpose, scope, and duration because *Respondent* was *legitimately* attempting to ensure that *Petitioner* did not *retaliate* against *Respondent* by removing or destroying court files or other court property. (17a-19a [2d Cir.'s Op.]; 48a-49a [Dist. Ct.'s Op.].)

4. *The Search of Petitioner's Personal Documents*

As a separate argument subheading in both courts below (*e.g.*, Appellant's Br., Point I.C.3., at 29-30)). Petitioner argued that even if it were held that Respondent did not violate his Fourth Amendment rights by searching his office, desk, or file cabinets, Respondent nevertheless violated that Amendment by reading Petitioner's private papers therein--personal file cards and personal files--for the purpose of finding his notes on Respondent's misconduct. (*See* Compl. ¶¶ 18 (73a-74a), 24 (76a), 27 (77a).)

While acknowledging Petitioner's allegations that his "belongings," including his "personal file cards" and "personal files," were searched (6a, 18a-19a [2d Cir.'s Op.]; 25a. 47a, 49a [Dist. Ct.'s Op.]), the courts below made no mention of the allegation that any search

in this case was effected to obtain Petitioner's notes of Respondent's misconduct. Nor did those courts directly address the issue of the search of Petitioner's private documents, although they did uphold the *seizures* of Petitioner's belongings on the ground that the seizures were effected to safeguard court property, *see supra* part C.3., p. 12.

Moreover, the courts' only discussions of any sort relating to documents was in the context of the examinations of the question of Petitioner's expectation of privacy in his office, desk, and file cabinets. The District Court there said that "[t]he case files, memoranda and correspondence pertaining to judicial matters . . . whether found in file cabinets or desk drawers, must be deemed to be subject to the control of, and inspection by, the judge." (51a.) The Circuit Court, in a passage more fully

quoted above, *see supra* part C.2., p. 11, went further than the District Court: It indicated that the "judge necessarily has access to the files and papers kept by the clerk," which entails access not only to "documents pertaining to a case," but also "the clerk's notes on discussions with the judge," which may include recording of the judge's "confidential thoughts" and "feelings."

5. *The Forcible Removal of Petitioner from the Courthouse*

Petitioner argued to both courts below that under the well-established precedents established by this Court and routinely followed by the lower federal courts, he was seized when he was forced (Compl. ¶ 22 (75a)) to walk with the court officers out of the chambers and out of the courthouse (which, as a member of the public, he had the right to remain in), and when his reentry into the courthouse was barred

(Compl. ¶ 23 (76a)).

The District Court's decision deemed "frivolous" Petitioner's claim that he had been seized, stating that "his liberty was not restrained" because "he was free to go anywhere else that he desired" other than the courthouse. (52a n.3.) The Court of Appeals concurred in all respects, adding that Petitioner was "free to leave" in that neither his wallet nor car keys were taken from him. (19a-20a.)

REASONS FOR GRANTING THE WRIT

I.

In both the unprecedented manner in which it construed this Court's plurality opinion in *O'Connor v. Ortega*, 480 U.S. 709 (1987), and in the stark result it thereby reached that law clerks have no legitimate expectation of privacy in the workplace, the Second Circuit's decision below raises very serious issues warranting this Court's consideration.

In *O'Connor v. Ortega*, 480 U.S. 709 (1987), a four-Justice plurality espoused the view that the question whether a

government employee has a reasonable expectation of privacy in his or her office, or desk or file cabinets therein, "must be addressed on a case-by-case basis." *Id.* at 718 (plurality opinion). Thus, the issue for the *Ortega* plurality was not whether state hospital psychiatrists generally have a reasonable expectation of privacy in their workplaces, but whether the expectation of privacy in the workplace held by the state hospital psychiatrist in that case had been "reduced by virtue of actual offices practices and procedures, or by legitimate regulation." *Id.* at 717; *see id.* at 718-19.[6]

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[6]Since it is argued herein that the courts below were clearly in error in their application of the case-by-case approach adopted by the *Ortega* plurality, this Petition does not address the opinions of the other five Justice in *Ortega*, which take a broader view of a government employee's expectation of privacy in the workplace. 480 U.S. at 730-31 (Scalia, J., concurring in the judgment); *id.* at 732, 737-41 (Blackmun, J., joined by three other Justices). *See also infra* p. 21 note 12.

Were this Court to agree with the courts below with respect to the *meaning* of that plurality

The cases cited with approval in the plurality opinion employ the case-by-case approach in the same manner.[7] So do all of the post-*Ortega* cases relying on the plurality's opinion on the question of an employee's expectation of privacy,[8] even where the employee works in law enforcement

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opinion, then this case would provide the Court with an opportunity to address the issue of the *persuasive authority* of that opinion vis-a-vis those of the other five *Ortega* Justices. *See, e.g.*, *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328, 1333-34 (9th Cir. 1987), *appeal after remand*, 944 F.2d 483 (1991), *cert. denied*, 112 S. Ct. 1514 (1992); 1 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 2.4, p. 87 (2d ed. Supp. 1994).

[7] *Mancusi v. Forte*, 392 U.S. 364, 367-70 (1968); *Gillard v. Schmidt*, 579 F.2d 825, 828-29 (3d Cir. 1978); *United States v. Speights*, 557 F.2d 362, 363-65 (3d Cir. 1977); *United States v. Blok*, 188 F.2d 1019, 1020-21 (D.C. Cir. 1951).

[8] Heather L. Hanson, Note, *The Fourth Amendment in the Workplace: Are We Really Being Reasonable?*, 79 Va. L. Rev. 243, 250-51 (1993); *see, e.g.*, *United States v. Mancini*, 8 F.3d 104, 108-10 (1st Cir. 1993); *United States v. Chuang*, 897 F.2d 646, 649-51 (2d Cir.), *cert. denied*, 498 U.S. 824 (1990); *American Postal Workers Union* v. *United States Postal Serv.*, 871 F.2d 556, 559-61 (6th Cir. 1989).

or the military.[9]

Nevertheless, despite urgings by Petitioner to the contrary, the Second Circuit ignored the allegations in the Complaint (77a-78a, ¶ 29) establishing that Petitioner's expectation of privacy had in no way been reduced by practice, procedure, or regulation. The court instead held that the judge/clerk relationship is "unique" and thus that law clerks as a class have no reasonable expectation of privacy in their private offices, or desk or file cabinets therein (16a-17a).

The imprudence of the Second Circuit's supposed application of a "case-by-case" approach is readily apparent. The decision apparently applies to *all* law clerks,

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[9] *E.g., United States v. Taketa*, 923 F.2d 665, 672-73 (9th Cir. 1991); *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328, 1333-35 (9th Cir. 1987), *appeal after remand*, 944 F.2d 483, 488-89 (1991), *cert. denied*, 112 S. Ct. 1514 (1992); *United States v. Craig*, 32 M.J. 614, 615 (A.C.M.R. 1991); *United States v. Battles*, 25 M.J. 58, 59-60 (C.M.A. 1987).

regardless of whether they are federal, state, or local, full-time or part-time, permanent or temporary; whether they work in large cities or small towns;[10] whether they work alone for one judge, with other clerks for one judge, or as part of a pool; whether or not they have an intimate working relationship with the judge;[11] whether they have locks, even personal ones, on their desks or cabinets; whether they have special needs that require special privacy; and even whether the judge they work for expressly advises them that they can expect privacy in their workplace. Indeed, a decision that supposedly is intended to foster "an absolutely free flow

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[10]The District Court below seemed to have limited its ruling to "large metropolitan areas." (51a.)

[11]As a former federal judge has recently noted, different members of this very Court have relied on their law clerks to very different degrees. Marvin E. Frankel, *A Matter of Opinions*, N.Y. Times, May 15, 1994, § 4, at 15.

of information between the clerk and the judge" (16a-17a) may end up having the opposite effect.[12]

Moreover, the Second Circuit's decision will be difficult to limit to law clerks. Judges will naturally want it extended to other confidential judicial personnel, such as secretaries and probation officers.[13] Magistrates,

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[12] *Cf. Ortega*, 480 U.S. at 743-47 (Blackmun, J., dissenting) (disapproving of adopting Fourth Amendment per se rules on basis of assumptions unsupported by specific data or evidence); *United States v. Little*, 18 F.3d 1499, 1504 n.5 (10th Cir. 1994) (en banc) (same). Indeed, the Second Circuit's reliance on the *Ortega* plurality's "case-by-case" approach to justify its holding that law clerks have no reasonable expectation of privacy in the workplace, is particularly troublesome because the only per se rule clearly endorsed in *Ortega* regarding the expectation of privacy was Justice Scalia's opinion, concurring in the judgment, that *all* government employees *have* a reasonable expectation of privacy in their nonpublic offices and the desks and file cabinets therein. 480 U.S. at 731. *See also supra* pp. 17-18 note 6.

[13] In *Forrester v. White*, 792 F.2d 647, 654, 656 n.9, 657 (7th Cir. 1986), the court singled out judges as being absolutely immune from damage suits for actions they take against their confidential employees, such as probation officers. This Court unanimously rejected that position, cautioning

administrative law judges, and other quasi-judicial entities will want the decision to apply to their staffs. Members of executive and legislative branches at all levels of government will, of course, expect the decision to cover *their* confidential employees.[14] In fact, since this Court has held that even the President

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judges about their hypersensitivity in ruling in cases in which other judges are defendants. 484 U.S. 219, 225-39 (1988;) *accord Forrester*, 792 F.2d at 663 (Posner, J., dissenting); *cf. Nixon v. United States*, 113 S. Ct. 732, 738-39 (1993) (Framers recognized difficulty judges have in sitting in judgment on their peers); *United States v. Pollard*, 959 F.2d 1011, 1030-31 (D.C. Cir.) (after characterizing as "shocking" the charge by Professor Dershowitz, based on investigation by former Justice Goldberg, that district court judge had ex parte communications with prosecutors prior to sentencing in espionage case, circuit court affirmed district judge's refusal to grant hearing or recuse himself, since the judge denied the "very weak" charge), *cert. denied*, 113 S. Ct. 322 (1992).

The Second Circuit decision below effectively accomplished an end-run around *Forrester* insofar as Fourth Amendment claims are concerned. The District Court's memorandum had extended that end-run to the First Amendment as well. *See supra* part C.1., p. 8.

[14]As one former federal judge has noted, some members of this Court have relied on their clerks *less* than their counterparts in government have on their confidential employees. Frankel, *supra*.

does not have absolute power over physical evidence in his or her *own possession* concerning conversations that took place in his or her *own private office*, *Nixon v. United States*, 418 U.S. 683, 703-16 (1974), the judiciary's position in the eyes of the public would be significantly diminished by its seeming arrogance in placing itself, and only itself, above the law. *See supra* pp. 21-22 note 13; *see also In re Certain Complaints*, 783 F.2d 1488, 1517-25 (11th Cir. 1985) (relying on *Nixon*, holds that federal judge's privilege in documents and conversations exchanged between him and his secretary and law clerks is overridden by public interest in criminal investigation of judge), *cert. denied*, 477 U.S. 904 (1986).[15]

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[15]Not only does the Second Circuit's unique application of the case-by-case analysis in this case place judges in a position above all other employers, but it places law clerks in a position below all other employees, including those in the military and law enforcement, *see supra* p. 19 note

Finally, the Second Circuit's basing its decision that a "judge necessarily has access to the files and papers kept by the clerk" on the supposed necessity that there be "an absolute free flow of information between the judge and the clerk" (16a-17a) raises additional questions. For example, does the clerk have a reciprocal right to indiscriminately rummage through the judge's office, desk, and file cabinets therein? Also, in light of the basis of the Second Circuit's decision, it is not entirely clear the decision must be limited to searches of clerk's office, desk, and file cabinets. If the judge must have

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9, who have traditionally received *less* protection in the workplace than other employees in both the Fourth and First Amendment contexts, *see, e.g.*, *Ortega*, 480 U.S. at 745 n.2 (Blackmun, J., dissenting); *Brown v. Glines*, 444 U.S. 348, 353-58 (1980); *United States v. Chapman*, 954 F.2d 1352, 1366-71 (7th Cir. 1992); *Williams v. Board of Regents*, 629 F.2d 993, 1003 (5th Cir. 1980), *cert. denied*, 452 U.S. 926 (1981). Indeed, the decision below might place law clerks below schoolchildren, *New Jersey v. T.L.O.*, 469 U.S. 325, 337 n.5 (1985), and on a par with persons in prison, *id.* at 338.

"absolute" "access to the papers and files kept by the clerk," why would there by any Fourth Amendment restrictions--notwithstanding the most improper of motives--upon a judge's search of a law clerk's body, documents he or she is carrying, or even briefcase or handbag, whether the clerk is in chambers, the courtroom, the library, or elsewhere in the courthouse?[16]

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[16]The Second Circuit's decision would be somewhat less disturbing if all of the persons who ascend to the bench could be trusted to discharge their duties toward the public and their employees in a reasonable manner. Unfortunately, this is not the case in all jurisdictions.

For example, three of the four New York State Supreme Court justices who were convicted of crimes between 1973 and 1987 sat in the county in which Petitioner worked for Respondent. M.L. Henry Jr., *In Defense of Appointed Judges*, N.Y.L.J., Feb. 29, 1988, at 2. One of those three was convicted in 1985 of "the taking of bribes and the corruption of his judicial office." *United States v. Brennan*, 798 F.2d 581, 582 (2d Cir. 1986). The last of those three committed perjury, while serving as administrative judge of that county, shortly after Petitioner began to work for Respondent. *In re Smith*, 132 A.D.2d 64 (1987).

Also around that time, when his law clerk had refused to continue an extramarital affair with him, the former Bronx County (New York City) Surrogate

II.

The decision below both presents this Court with an issue expressly left open in *Ortega*--the appropriate standard for determining the propriety under the Fourth Amendment of a seizure of personal belongings in the workplace--and directly conflicts with the holding in *Ortega* that a workplace search or seizure violates that Amendment if it is effected for an illegitimate purpose.

In *Ortega*, eight Justices explicitly left open the question of the appropriate standard for evaluating the Fourth Amendment reasonableness of a seizure of a government employee's personal effects in

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Court Judge fired the clerk; searched her office; harassed her over the phone; threatened court officials, her new boyfriend, and her new employer; and lied to the Commission on Judicial Conduct when it was investigating these matters. *In re Gelfand*, 70 N.Y.2d 211, 215, *cert. denied*, 484 U.S. 977 (1987). Quite recently, the former New York State Court of Appeals Chief Judge admitted in his guilty plea in federal court that when he was spurned by his extramarital lover in the early 1990's, he carried on a long-term campaign of kidnapping threats and harassment against her and her child, and used his own staff and a state appellate court presiding justice to compile a dossier on, and obtain the confidential bar file of, her new attorney/companion. N.R. Kleinfield, *Admitting Guilt, Wachtler Offers Account of Plot*, N.Y. Times, April 1, 1993, at A1, B4.

the workplace. 480 U.S. at 729 n.* (plurality opinion); *id.* at 747-48 n.14 (Blackmun, J., dissenting). The Second Circuit below characterized the detention of Petitioner's property as "brief" and hence reasonable (18a-19a), even though, according to the Complaint (75a-77a, ¶¶ 22-28): (1) Petitioner was prevented from taking any of his belongings with him when he was forced out of the courthouse; and (2) when he returned two days later, (a) almost all of his effects were in a carton; (b) his box of personal file cards had been secreted in *Respondent's* office; and (c) he was prevented from taking his personal files with him for an additional number of days. Hence, this case presents the Court with a clear opportunity to examine issues concerning the proper duration and manner of a workplace search of private effects.

Moreover, aside from sustaining the duration and manner of Respondent's seizure

of Petitioner's belongings, the Second Circuit sustained the *purpose* of those seizures, ruling that they were necessary to protect court property from a terminated employee. (17a-19a.) However, as Petitioner made clear to both courts below, such a ruling is flagrantly contrary to both procedural and substantive law.

As the Second Circuit putatively acknowledged (8a-10a), on a motion for judgment on the pleadings on the basis of an alleged failure to state a claim, both the District Court and a reviewing court must accept as true the allegations in the complaint . *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). But the Complaint herein (73a-74a, ¶¶ 18-19; 76a-77a, ¶¶ 24-27) alleges that Respondent seized Petitioner's property upon and after ejecting Petitioner from the courthouse, not for any legitimate work-related reason, but to locate and suppress notes Petitioner had taken about

Respondent's misconduct. Thus, the Second Circuit's upholding the seizure on the basis of a justification which is contested by Petitioner is in direct conflict, not only with the Federal Rules of Civil Procedure, but also with the clear holding of *Ortega* and its progeny that a workplace search or seizure cannot be justified as a matter of law on the basis of a proffered reason contested by the aggrieved party. 480 U.S. at 727-28 (plurality opinion); *id.* at 732 (Scalia, J., concurring in the judgment); *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328, 1336-37 (9th Cir. 1987), *appeal after remand*, 944 F.2d 483, 488-89 (1991), *cert. denied*, 112 S. Ct. 1514 (1992); *McGregor v. Greer*, 748 F. Supp. 881, 888-89 (D.D.C. 1990).

III.

This case presents the Court with the opportunity to resolve longstanding troubling issues concerning the search of private papers, including the question not addressed in *Ortega* regarding the standards for testing the propriety of such searches when conducted in the workplace.

This Court has long acknowledged the depth of feeling of the Framers of the Constitution that the government not be permitted to intrude upon their most private concerns by rummaging through the personal papers that they keep in their desks, files, and elsewhere. *Boyd v. United States*, 116 U.S. 616 (1886). Indeed, the Fourth Amendment explicitly enumerates "papers" as a protected entity apart from "effects." The Court has also routinely indicated that since papers, books, films, and the like contain material that is protected by the First Amendment, searches of such items should receive special scrutiny to ensure that only those portions

needed for legitimate governmental purposes be read.[17]

Although this Court has never directly addressed the issue,[18] it had been consistently held by the lower federal courts prior to 1987 that a government official conducting an otherwise proper search can only examine portions of such "protected" material--particularly documents--to the extent that the official has a reasonable suspicion that those

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[17] *Maryland v. Macon*, 472 U.S. 463, 468 (1985); *Walter v. United States*, 447 U.S. 649, 655 (1980) (Stevens, J., announcing judgment of the Court); *Zurcher v. Stanford Daily*, 436 U.S. 547, 564-65 (1978); *Andresen v. Maryland*, 427 U.S. 468, 482 n.11 (1976); *Fisher v. United States*, 425 U.S. 391, 401 n.7 (1976) (citing with approval *United States v. Bennett*, 409 F.2d 888, 897 (2d Cir.) (Friendly, J.), *amended*, 415 F.2d 1113, 1115 n.2 (1969), *cert. denied*, 402 U.S. 984 (1971)).

[18] In *Crouch v. United States*, 454 U.S. 952, 953-94 (1981), Justices White and Brennan, dissenting from a denial of certiorari to the circuit court in *United States v. Crouch*, 648 F.2d 932, 933-94 (4th Cir. 1981) (per curiam), stated that the issue of the brief perusal of documents, particularly personal ones, "raises important questions that should be settled" by an "authoritative direction from this Court."

portions relate to the legitimate governmental purpose that justifies the initial search; such an examination begins with a brief perusal of the document, with more intensive inspection limited to those portions as to which reasonable suspicion survives that perusal and further levels of examination.[19] By holding in *Arizona v. Hicks*, 480 U.S. 321, 324-29 (1987) that probable cause, not reasonable suspicion, is required in such situations even as to nonprotected items--such as stereo components--the Court strengthened the protection which had traditionally been

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[19]The case most frequently cited in the area is Judge Friendly's opinion for the Second Circuit in *United States v. Ochs*, 595 F.2d 1247, 1256-58 & n.8 (2d Cir. 1979). Among those cases relying on *Ochs* are *United States v. Iredia*, 866 F.2d 114, 119 (5th Cir.) (per curiam), *cert. denied*, 492 U.S. 921 (1993); *United States v. Isaacs*, 708 F.2d 1365, 1368-70 (9th Cir.), *cert. denied*, 465 U.S. 1021 (1983); *United States v. Heldt*, 668 F.2d 1238, 1266-69 (D.C. Cir. 1981) (per curiam), *cert. denied*, 456 U.S. 926 (1982); *United States v. Weber*, 668 F.2d 552, 565 (1st Cir. 1981) (denial of petition for rehearing), *cert. denied*, 457 U.S. 1105 (1982).

afforded to protected material.

However, *Hicks* did not address the additional issues peculiar to protected material and raised in the cases cited above: whether such searches of protected material are subject to special scrutiny; whether the levels-of-intensity rules still apply to such material; and whether the answers to these two questions are affected by the nature of the material: For example, does a personal diary receive the same protection as a business notebook? *See* 1 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 2.6(e) (2d ed. 1987 & Supp. 1994); 2 *id.* § 4.11(c).

More directly related to this case, when it was established three weeks after *Hicks* was decided that only reasonable suspicion was needed to search the workplace of a government employee, *O'Connor v. Ortega*, 480 U.S. 709, 725-26

(1987) (plurality opinion); *see id.* at 732 (Scalia, J., concurring in the judgment), the Court was not confronted with any issue concerning the search of the belongings of the employee.[20] Thus, several questions are raised. Does the probable cause requirement of *Hicks* apply to the search of items seized during a workplace search, since the initial search need only be based on reasonable suspicion? If not, does protected material at least receive special consideration, especially if it is very personal, such as a diary?

While one commentator has simply noted the existence of an interplay between *Ortega* and *Hicks*, Heather L. Hanson, Note, *The Fourth Amendment in the Workplace: Are We Really Being Reasonable?*, 79 Va. L. Rev.

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[20]Although there was no search of private belongings in *Ortega*, there was a seizure of such items. However, eight Justices in that case expressly left open the question concerning standards relative to such seizures. *See supra* part II., pp. 26-27.

243, 268-71 (1993), federal cases construing *Ortega* have not recognized that interplay, and have dealt in an unfocused manner with some of the issues discussed above concerning the search of documents.[21]

The instant case would provide the Court with ample opportunity to examine many of these unresolved issues. Petitioner argued below, on the basis of the Complaint, that Respondent searched his personal file cards and files in order to find his notes on Respondent's misconduct; the Second Circuit acknowledged that Petitioner complained of the search of his private documents and ruled that none of the searches conducted by Respondent

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[21] *E.g.*, *United States v. Mancini*, 8 F.3d 104, 108 (1st Cir. 1993); *Schowengerdt v. United States*, 944 F.2d 483, 488-89 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1514 (1992); *United States v. Chuang*, 897 F.2d 646, 650-51 (2d Cir.), *cert. denied*, 498 U.S. 824 (1990); *Director of Office of Thrift Supervision v. Ernst & Young*, 795 F. Supp. 7, 10-11 (D.D.C. 1992); *McGregor v. Greer*, 748 F. Supp. 881, 889 (D.D.C. 1990).

violated the Fourth Amendment, albeit without directly addressing Petitioner's claim regarding the search of his personal papers. *See supra* part C.4, pp. 13-15.

While that ruling might be attributable to a clearly erroneous failure on the part of that court to decide Petitioner's claim or to accept the allegations in the Complaint as to the scope of, and motive for, the search of those papers, *see supra* part II., p. 27-29, it is more likely that the court actually held that Petitioner had no legitimate expectation of privacy in his private papers in chambers. The court's only consideration of the matter of documents appears in its discussion of a law clerk's expectation of privacy in his or her office and desk and file cabinets therein; and that discussion focused almost entirely on the "absolute" need for a judge to have complete access to the papers in the

clerk's possession, including notes about the judge's "confidential thoughts" and "feelings." (16a-17a.)

A lower court's clear disregard of an argument, the facts, or the law sometimes leads this court to summarily reverse the judgment on a petition for certiorari.[22] However, notwithstanding the possibility that the Second Circuit merely ignored Petitioner's challenge to the search of his private papers, it would seem that plenary consideration of the document search issues would be appropriate, since (1) it appears more likely that the Second Circuit actually held that law clerks have no reasonable expectation of privacy in any papers in their office or desk or file cabinets therein; (2) the case in any event

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[22] *See, e.g., Burden v. Zant*, 114 S. Ct. 654, 655 (1994) (unanimous per curiam summary reversal). *But see, e.g., Stansbury v. California*, 114 S. Ct. 1526, 1528-30 (unanimous per curiam opinion); *Burden v. Zant*, 498 U.S. 433, 436-38 (1991) (same).

raises vital issues regarding the scope of searches of private papers, which issues have not been directly addressed by this Court and which, in the context of the workplace, were not addressed in *Ortega*; and (c) the issue of the search of private documents in the workplace is intimately connected with the previous two Reasons for Granting the Writ herein.[23]

IV.

The decision below gives the Court an opportunity to rule on interwoven two issues about which the lower federal courts had essentially always been in agreement and which this Court has never directly confronted: the Fourth Amendment ramifications of the forcible movement of a person from one place to another, without any further detention, and the placing of restrictions on a citizen's right to enter a courthouse.

This Court has stopped just short of holding that a forced movement of a person

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[23]Indeed, this Court granted full certiorari in *Ortega* even though the record in that case was unsettled and the circuit court had not explained one of its rulings reviewed by this Court. 480 U.S. at 714, 726-29 (plurality opinion).

from one location to another, in the absence of any additional detention, constitutes a Fourth Amendment seizure. In *Sibron v. New York*, 392 U.S. 40, 63 (1968), this Court indicated in dictum that a seizure occurs when an individual moves from inside to outside a restaurant pursuant to a police officer's order. This aspect of *Sibron* was cited approvingly in *United States v. Mendenhall*, 446 U.S. 544, 557-58 (1980); *id.* at 553 (Stewart, J., joined only by Rehnquist, J.) in the context of a citizen's accompanying an officer from one location to a nearby office. In those cases and others, the Court has repeatedly endorsed the view that a person is seized if the police conduct "'would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" *Florida v. Bostwick*, 111 S. Ct. 2382, 2387 (1991) (quoting *Michigan v.*

Chesternut, 486 U.S. 567, 569 (1988)).

Thus, the circuit courts, including the Second Circuit, have repeatedly acknowledged that a seizure exists where there is a forced movement, however brief, from one unconfining location to another;[24] and that seizures exist in other types of situations where the citizen is at no time forced to remain in one place.[25]

Nevertheless, despite being alerted by Petitioner to the above precedents, and despite acknowledging (6a) that the Complaint (75a-76a, ¶¶ 22) indicated that

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[24] *Morgan v. Woessner*, 997 F.2d 1244, 1252-54 (9th Cir. 1993), *petition for cert. dismissed sub nom. Searle v. Morgan*, 62 U.S.L.W. 3473 (U.S. Jan. 10, 1994) (No. 93-810); *United States v. Laboy*, 979 F.2d 795, 799-800 (10th Cir. 1992); *United States v. Springer*, 946 F.2d 1012, 1014-17 (2d Cir. 1992); *United States v. Lee*, 916 F.2d 814, 816, 819 (2d Cir. 1990); *United States v. Moreno*, 897 F.2d 26, 30-31 (2d Cir.), *cert. denied*, 497 U.S. 1009 (1990).

[25] *United States v. Jones*, 990 F.2d 405, 408 (8th Cir.), *cert. denied*, 114 S. Ct. 350 (1993); *United States v. Wilson*, 953 F.2d 116, 122-23 (4th Cir. 1991); *United States v. Thompson*, 941 F.2d 66, 68-70 (2d Cir. 1991).

court officers "forced" Petitioner to leave the chambers and the courthouse in their company, the Second Circuit held that Petitioner was not seized. Adopting the words of the District Court, the Court of Appeals reasoned that Petitioner "was 'free to go anywhere else he desired,' with the exception of [Respondent's] chambers and the court house." (19a-20a [2d Cir.'s Op.]; 52a n.3 [Dist. Ct.'s Op.].)

The decision below is especially disturbing because Petitioner was not only forced to move from one location to another, but was then prevented from returning into the building from which he had been removed--a building which was not only open to the public, but was required to be so by the Constitution and a state statute.[26] Although this Court has never

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[26] *E.g.*, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982); N.Y. Jud. Law § 4 (McKinney 1983).

In arguing to the courts below that several of

addressed the issue, lower federal courts, including courts in the Second Circuit prior to this case, have consistently held that the Fourth Amendment places restrictions on government attempts to restrict access to courthouses.[27]

The broader difficulties with the decision below are obvious. In contrast to its treatment of the workplace search, the Second Circuit made no attempt to limit its body seizure holding to law clerks. Thus,

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Respondent's actions violated Petitioner's First Amendment right of access to criminal proceedings, Petitioner claimed that a violation of that right occurred when he was forcibly removed from the courthouse and his reentry was barred. (*E.g.*, Appellant's Br. at 36.) In this Petition, Petitioner raises that claim to the extent that it bears on the Fourth Amendment challenge to that ejection and restraint. *See supra* part C.1., p. 9 note 5; *see also* Sup. Ct. R. 14.1(a).

[27] *Klarfield v. United States*, 944 F.2d 583, 586-87 (9th Cir. 1991) (per curiam); *Justice v. Elrod*, 832 F.2d 1048, 1049-50 (7th Cir. 1987) (Posner, J.); *McMorris v. Alioto*, 567 F.2d 897, 899-900 (9th Cir. 1978) (then Cir. J., now Justice, Kennedy); *Downing v. Kunzig*, 454 F.2d 1230, 1232-33 (6th Cir. 1972); *Legal Aid Soc'y v. Crosson*, 784 F. Supp. 1127, 1130-31 (S.D.N.Y. 1992).

under that decision, no government employee is protected by the Fourth Amendment from being arbitrarily, or maliciously, ejected from his or her place of work and prevented from reentering it.

Moreover, nothing in the decision below limits the holding to government employees in the workplace, or places restrictions on the duration of the movement or the number of times such a movement can be compelled. Can the police, without restraint by the Fourth Amendment, now order citizens to move from any location to any other location, as long as the citizens are "free to leave" at the end of their trips? Can the police order someone out of one building, and then into another, an innumerable amount of times?

V.

It would be more appropriate for this Court to grant certiorari on the Fourth Amendment issues now, rather than waiting until the entire case is completed.

Although the instant case has not been completed, the Fourth Amendment claims have.[28] The case is over three years old, and, despite Petitioner's best efforts to move the case quickly, *see supra* part B., pp. 7-8 note 4, discovery has not even begun. If the Second Circuit's opinion is not reviewed now, it may be a long time before this Court will have an opportunity again to consider the case. Since that opinion takes extreme positions on some very important issues--particularly ones involving the relationship between judges and law clerks throughout the country--a quick resolution should be had. Indeed, it is unlikely that any other law clerk will raise such issues in the interim, if ever. *See Forrester v. White*, 792 F.2d 647, 663 (7th Cir. 1986) (Posner, J., dissenting), *rev'd*, 484 U.S. 219 (1988).

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[28]This Court granted certiorari in a nonfinal case in *Ortega*. 480 U.S. at 714 (plurality opinion).

Further, in light of the extreme financial and career hardships Petitioner's discharge and this case have imposed upon him, *see supra* part B., pp. 7-8 & note 4, he may be forced to agree to a premature, unsatisfactory settlement of the case in the absence of a stronger signal than the one sent by the Second Circuit below that both substantive and procedural law must be observed implicitly.[29] And, of course, if

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[29] In *Rodriguez v. United States*, 480 U.S. 522 (1987) (per curiam), this Court, with essential unanimity, accepted Petitioner's argument that a case that was otherwise not particularly worthy of the Court's consideration should be accepted in order to send a strong signal to the Second Circuit that this Court's jurisprudence on statutory construction is not to be ignored.

The circuit courts have frequently recognized that the cases of federal civil rights litigants can be effectively destroyed if the courts overseeing them do not exercise vigilance about unwarranted delays, particularly those caused by clearly improper rulings. *Reynaga v. Cammisa*, 971 F.2d 414, 417-18 n.4 (9th Cir. 1992); *Yates v. City of Cleveland*, 941 F.2d 444, 449 (6th Cir. 1991); *Weir v. Probst*, 915 F.2d 283, 286 (7th Cir. 1990) (Posner, J.); *Crippa v. Dukakis*, 905 F.2d 553, 556-57 (1st Cir. 1990); *Abel v. Miller*, 904 F.2d 394, 396 (7th Cir. 1990) (Easterbrook, J.); *Apostol v. Gallon*, 870 F.2d 1335, 1339-40 (7th Cir. 1989) (Easterbrook, J.).

a settlement is reached, this Court will not have a later opportunity to decide the Fourth Amendment issues presented by the case.

CONCLUSION

For the reasons state above, the Petition for a writ of certiorari should be granted.

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